at 233 F. Supp. 578. The opinion of the court of appeals (Ross Pet. App. A) is reported at 386 F. 2d 42.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1967. A timely petition for rehearing was denied on January 11, 1968. The petitions for writs of certiorari were filed on February 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that the district court had acted beyond its powers in undertaking to revise the terms of distribution under a merger agreement between two savings and loan institutions where it appeared, *inter alia,* that the agreement had been approved by the voting members and stockholders of the merged organizations and by the appropriate State and federal administrative authorities.

2. Whether laches barred the relief which petitioners sought.

STATUTES AND REGULATION INVOLVED

Section 5(d)(2) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464(d)(2),[2] provides in pertinent part:

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which are being lodged with the Clerk of this Court. Briefs filed in the court of appeals, to which reference is made herein, are found in volume one of the certified transcript of the record.

[2] References are to the 1964 edition of the United States Code. The 1966 amendment to the Act (P.L. 89-695, 80 Stat. 1035) effected no substantial change in Section 5(d)(2).

> The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations * * *.

12 C.F.R. 546.4 and Section 9204 of the California Financial Code are reprinted in Appendix II to the petition in No. 1118 (Elliott Pet. App. II 8, 10). Section 9203 and 9205 of the California Financial Code provide as follows:

> § 9203. *Merger and consolidation of domestic and federal associations.* Any one or more domestic associations, and any one or more federal savings and loan associations, may be merged into one of such constituent associations, or consolidated into a new association, domestic or federal, with or without any dissolution or division of the funds or property of any of them.
>
> § 9205. *Approval of commissioner; compliance with federal law.* Any merger, consolidation, or transfer made pursuant to Sections 9203 and 9204 shall be approved by the commissioner, and with respect to any constitutent domestic association be made in conformity with the provisions of law applicable to mergers, consolidations, and transfers in the case of corporations generally, and with respect to any constitutent federal savings and loan association, be made in conformity with the provisions of the laws of the United States, and the rules and regulations of the Federal Home Loan Bank Board applicable to mergers, consolidations, and transfers.

STATEMENT

On April 22, 1960, the Federal Home Loan Bank Board took over the management of Long Beach Federal Savings and Loan Association, a federal mutual savings and loan association, as the result of its determination that Long Beach had engaged in unsound financial operations. Resulting litigation between the Board and Long Beach was settled in February 1962 by an agreement which provided for the return of Long Beach to private management and which permitted Long Beach to elect to liquidate pursuant to a specified plan.[3] Long Beach was returned to private management on April 2, 1962, and in May of that year it abandoned its original liquidation plan and informally submitted to the Board a new plan for merging itself into Equitable Savings and Loan Association, a California-chartered, permanent stock association. Under the new proposal, all of Long Beach's assets and liabilities would be transferred to Equitable, and Long Beach's depositor-shareholders would receive Equitable guarantee stock, on a pro rata basis, in payment for the net worth of Long Beach (Ross Pet. App. A 2–4).

The Board found, however, that beginning on April 2, 1962, there had been a sudden influx of large accounts into Long Beach, most of which were opened

[3] The settlement agreement also compromised litigation resulting from a 1946 Board take-over of Long Beach management, which was also based upon a Board determination that Long Beach had engaged in unsound financial operations (Ross Pet. App. A 2–3).

with borrowed money by persons who had no prior connection with Long Beach. For example, 77 accounts of $100,000 or over, totalling about $20,500,000, were opened on and after April 2, 1962 (there had been only one such account in April 1960), and there also had been a "dramatic increase in the number of large new accounts ranging from $20,000 to $100,000" (Ross Pet. App. A 4–5 & nn. 5–7). The Board determined that in view of the proposed merger the Long Beach management breached its fiduciary duty by permitting this great influx of new money, which diluted the interests of the small and regular shareholders in Long Beach's net worth.[4] To prevent the speculating new depositors from siphoning off a substantial part of Long Beach's net worth, the Board refused to approve a merger plan providing for the pro rata distribution of Equitable stock (Ross Pet. App. A 5).

Following negotiations with the Board, Long Beach and Equitable revised the merger agreement to deny participation in the Equitable stock to the extent that a new account opened after April 22, 1960, or any

[4] Contrary to petitioners' assertions (Elliott Pet. 16–17), the Board's analysis showed that Long Beach was not in a precarious financial position in April 1962, and that its need was not for more deposits, but for more sound loans in which to invest its liquid resources. Long Beach was in no position to invest the sudden and large inflow of new money in sound loans, yet it had to pay a high dividend rate, ranging from 4.5 percent to 4.8 percent, to the new depositors. Consequently Long Beach operated at a substantial loss after April 2, 1962. The losses, which amounted to over $100,000 per month during January-September 1963, in turn resulted in a substantial reduction in Long Beach's net worth (Ross Pet. App. A 5 n. 8; 17 R. 1374–1379).

addition to an account balance made after that date, exceeded $10,000.[5] With respect to pledged accounts, participation was denied to the extent of the pledge. In addition, "insiders" (*e.g.*, officers, directors, and attorneys of Long Beach and Equitable) were precluded from participating in the distribution except to the extent of their April 22, 1960, account balances (Ross Pet. App. A 6–7; Exh. D, 47–48).[6]

The revised merger agreement was executed by Long Beach and Equitable in June 1963, and tentatively approved by the Board, subject to certain formal and technical conditions. The Long Beach depositors and the Equitable stockholders approved the merger agreement in July 1963. The California Savings and Loan Commissioner approved the merger in August, and the Board gave its final approval on September 5, 1963. The merger was consummated on

[5] The $10,000 figure was selected because it was then the maximum amount of federal account insurance, and the Board believed that generally new accounts would not be opened by bona fide savers in amounts larger than $10,000 in any one account (Ross Pet. App. A 7 n. 13). (The perecntage of accounts in all savings and loan associations with balances under $10,000 was 93.4 percent in 1964. *1965 Savings and Loan Fact Book of the United States Saving and Loan League*, p. 20.) April 22, 1960 was the date the Board took control of Long Beach.

[6] At the request of Long Beach and its "Shareholders' Protective Committee" a provision was also inserted into the merger agreement which restated the existing legal right of shareholders to test judicially the merits or validity of the merger plan or any part thereof (Ross Pet. App. A 7, 14–15; 16 R. 1203).

September 10, 1963, by filing the agreement with the California authorities (Ross Pet. App. A 7–8).

On the same day, immediately following the consummation of the merger, Long Beach and four Long Beach shareholders, suing individually and as the Long Beach "Shareholders' Protective Committee," commenced an action against the Board in the district court seeking a judicial determination that the Equitable guarantee stock should be distributed pro rata to all Long Beach shareholders without diminution of any shareholder's interest, notwithstanding the terms of the consummated merger agreement. A similar suit filed on that day in the California Superior Court was subsequently removed by the Board to the district court. On September 17, 1963, Equitable filed a third suit, in the nature of interpleader, in the district court and deposited the contested Equitable guarantee stock in court (Ross Pet. App. A 8 n. 15).[7]

Following consolidation of the three actions, the district court directed the parties to file cross-motions for summary judgment. It then declared the restrictive distribution provisions in the consummated merger agreement invalid and ordered a pro rata distribution of the Equitable stock to all Long Beach share-

[7] The Federal Savings and Loan Insurance Corporation, whose operations are directed by the Board, was also a defendant in the three actions. The California Savings and Loan Commissioner was subsequently added as a party defendant in the second two actions. Petitioner Ross, who with his wife opened accounts in Long Beach in April 1962 aggregating approximately $1 million (Exh. C–15; Exh. S), intervened as a party plaintiff in all three suits.

holders (Elliott Pet. App. I 578–600). The court of appeals unanimously reversed, holding (1) that the district court was without power to order the distribution of the stock on a basis which had not been approved by the federal and state regulatory agencies and (2) that laches barred the relief which petitioners sought (Ross Pet. App. A 17–21).

ARGUMENT

1. Contrary to petitioners' assertions, the court below did not hold that the Board's action was immune from judicial review. The court stated that it did "not question the power of a district court, in appropriate circumstances, to determine the legality of provisions of a particular merger-distribution plan" (Ross Pet. App. A 17).[8] The court recognized, however (*id.* at 10-11, 13), that under Section 5(d)(2) of the Home Owners' Loan Act and 12 C.F.R. 546.4, the merger of Long Beach into Equitable could not be effectuated except under terms and conditions ap-

[8] The suggestion in the Elliott petition (pp. 8, 27) that a congressional investigating committee has commented adversely on the restrictive distribution terms of the Long Beach merger agreement is unfounded. In 1963, the Board's Chairman, Mr. McMurray, explained to a congressional committee why the general rule of equal treatment of depositors in a mutual institution did not apply to the Long Beach distribution (see Exh. 22, 146–163). However, the 1960 committee report cited by petitioners (with which six committee members disagreed) dealt only with the question of the Board's take-over of the management of Long Beach—a matter which was resolved by the February 1962 settlement agreement. See H. Rep. No. 2083, 86th Cong., 2d Sess.

proved by the Board,[9] and that the California Financial Code expressly requires that any such merger must also be approved by the California Savings and Loan Commissioner. Relying on these statutory and regulatory requirements, the court of appeals correctly held that the district court lacked the power to designate a revised distribution plan without the administrative approval of the Board and the California Commissioner (Ross Pet. App. A 17).

In an apparent attempt to show that they were prejudiced by the consumated merger agreement, petitioners consistently refer to the distribution as "forfeitures," implying that the speculators would lose their investment.[10] The short of it is that the de-

[9] As the court of appeals noted (Ross Pet. App. A 11), although 12 C.F.R. 546.4 does not expressly cover the merger of a federal institution into a state-chartered institution, it was recognized by the Board and Long Beach as the most nearly applicable regulation, and employed as the regulatory channel through which the instant merger should be processed. In 1966, the Board promulgated regulations which explicitly deal with such mergers, and unmistakably require Board approval. 31 Fed. Reg. 15235 (December 6, 1966), corrected in 31 Fed. Reg. 15569 (December 10, 1966). The court of appeals also pointed out (Ross Pet. App. A 11–13) the infirmities in the district court's conclusion that a different result was required by Section 5(i) of the Act, 12 U.S.C. 1464(i) (Elliott Pet. App. II 4).

[10] Petitioners' assertion that "thousands" of small shareholders were adversely affected by the restrictive distribution formula is based upon misleading and erroneous data supplied by petitioners. See 17 R. 1344–1345, and page 4a of our reply brief in the court of appeals. See also the statistical data set forth at pages 54–55 of our main brief in the court of appeals. As the court of appeals observed (Ross Pet. App. A 18 n. 29):

"Although the ['Shareholders' Protective Committee'] pur-

positors who were adversely affected by the distribution provisions had the right to withdraw their deposits at any time; and they were entitled to, and did, receive interest on their funds. The only "forfeiture" was the loss of the windfall which eleventh-hour speculators expected to receive upon the distribution of the Equitable stock—representing Long Beach's net worth accumulated over a 30-year period.[11]

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ports to represent a majority of the shareholders of Long Beach, the position which the Committee takes in this litigation is obviously adverse to the interest of all of the shareholders, comprising an overwhelming majority, who stand to gain by the restrictive distribution provisions of the merger agreement, and stand to lose by the pro rata distribution provisions of the judgments under review. In this litigation, then, the Committee (and Long Beach, since it joins in the Committee's position) actually occupy the status, or represent the interests, of minority shareholders challenging the terms of the approved merger agreement."

[11] The court of appeals did not reach petitioners' contentions that the restrictive distribution provisions of the merger agreement were invalid. These contentions are without merit.

(1) Petitioners assert that the merger was governed by the sixth proviso of the second unnumbered paragraph of Section 5(i) of the Act (12 U.S.C. 1464(i)). The court of appeals correctly recognized (Ross Pet. App. A 11–13) that this provision, which deals with the conversion of a federal mutual association into a State mutual association, has no application to the transaction involved here—the *merger* of a federal mutual association into a State *stock* association.

(2) Petitioners assert that the merger provisions conflict with the charter requirement of pro rata distribution. The case authority indicates, however, that the provision for pro rata distribution in Section 9 of the Long Beach charter (Exh. 19, 6)—which deals with "liquidation, dissolution, or winding up of the association"—does not apply to its "merger" into another association, see *Windhurst* v. *Central Leather Co.*, 105 N.J. Eq. 621, 153 Atl. 402; *Adams* v. *United States Distributing*

2. The holding of the court below that petitioners' claim was barred by laches is clearly correct, and there is no occasion for further review by this Court.

The court of appeals pointed out (Ross Pet. App. A 19, 21) that although the petitioners had full knowledge of the merger agreement "from at least the middle of June, 1963," they "deliberately wait[ed] with their law suits until after the merger had been consummated * * * to confront the court with an accomplished fact which would enable them to test the validity of the distribution provisions without interfering with the consummation of the merger." Petitioners disregarded their opportunity to obtain judicial review of the distribution provisions prior to

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Corp., 184 Va. 134, 34 S.E. 2d 244. And in all events, it is well established that merger terms may override charter provisions if they meet the test of fairness. *Clarke* v. *Gold Dust Corp.*, 106 F. 2d 598 (C.A. 3), certiorari denied, 309 U.S. 671; *Langfelder* v. *Universal Laboratories*, 68 F. Supp. 209 (D. Del.), affirmed, 163 F. 2d 804 (C.A. 3).

(3) In approving the merger, the Board found that the distribution provisions were "fair and equitable" and "in the interest of all concerned" (Exh. C–56). Although the factual issue of fairness was not before the lower courts, the Board's finding was fully warranted. See *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286–287; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207–209; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 145–146; *Adams* v. *Nagle*, 303 U.S. 532, 540–541, 543–544. Moreover, there was no denial of procedural due process. Since the Board's action was merely an approval of a proposed merger, the adjudicatory provisions of the Administrative Procedure Act requiring a formal hearing, 5 U.S.C. (Supp. II) 554, are of course inapplicable. Cf. *Bridgeport Fed. Sav. & L. Ass'n.* v. *Federal Home Loan Bank Board*, 307 F. 2d 580 (C.A. 3); *Federal Home Loan Bank Board* v. *Rowe*, 284 F. 2d 274 (C.A.D.C.).

the consummation of the merger.[12] In view of petitioners' untimely challenge, the court below found that the "substantial rights" of Long Beach and Equitable shareholders would be prejudiced, and "turmoil, uncertainty and delay" would ensue, if the merger agreement as a whole or the distribution provisions were set aside (Ross Pet. App. A 19–21). The court's conclusion that laches barred any relief to the petitioners was fully justified.[13]

Petitioners cite *Fahey* v. *Mallonee*, 332 U.S. 245, 257, in support of their contention that they could not challenge the validity of the merger agreement until after its consummation. But *Mallonee* held only that there was no basis to issue an injunction when there was not even a "threat" to merge. In the present case, however, there was nothing "hypothetical" about the merger. Similarly, there is no substance to petitioners' assertion that all parties, including the Board, agreed that the test of the validity of the merger agreement was to take place after consummation (Elliott Pet. 39 n. 43). As the court below observed (Ross Pet. App. A 15 n. 23), the Board's May 30, 1963 letter to Long

[12] Petitioners' assertion that the requirement of a bond made injunctive relief an illusory remedy is based on sheer conjecture. Assuming that the district court, in its discretion, would have required a bond, the government would certainly not have insisted upon a bond in a burdensome amount.

[13] The cases cited in the Elliott petition (pp. 40–41) either do not deal with laches (*e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426), or make clear that an attack on corporate action should precede consummation (*e.g.*, *Southern Pacific Co.* v. *Bogert*, 250 U.S. 483, 489).

Beach (Exh. C–44) set forth its position with respect to any judicial challenge to the merger plan; that letter refutes the suggestion that there was an agreement of the type alleged by petitioners.

3. Finally, the distribution problem involved in the present case is of relatively limited significance in the savings and loan industry. Petitioners erroneously imply (Elliott Pet. 4–5, 24–25) that all mergers or conversions of federal mutual associations into other savings and loan associations necessarily result in a distribution, in some form, of the federal association's net worth to its shareholders. In fact, a distribution of net worth never occurs when mutual associations merge; it can only occur in the limited number of cases when a federal mutual association is merged or converted into a state-chartered, permanent stock association.[14] Since 1945, the Board has approved approximately twenty mergers and conversions from mutual to state-chartered permanent stock associations. Only

[14] The net worth of a mutual association is owned by its shareholders-depositors, while the net worth of a permanent stock association is owned by the holders of the permanent stock. See *Society for Savings* v. *Bowers*, 349 U.S. 143, 150. Thus, when mutual associations merge there is no distribution of net worth, since the shareholders of the disappearing association necessarily acquire an equivalent ownership interest in the combined net worth of the resulting association. On the other hand, when a mutual association is merged into a permanent stock association, as in the instant case, there must be a distribution of the net worth of the mutual association to its shareholders, or else the owners of the permanent stock of the resulting association would obtain a windfall to the extent of the net worth of the mutual association.

in the instant case has the distribution problem given rise to litigation. Since December 1963, moreover, the Board has imposed a moratorium on approval of such mergers pending the completion of studies of the subject, including the problem of protecting the bona fide shareholders from speculative attempts to impair their interest in the mutual association's net worth.[15] See Scott and Hester, *Conversion of Mutual Savings and Loan Associations to Stock Form: Legal and Economic Issues* (Federal Home Loan Bank Board, December 1967). In May 1966, Congress authorized a complete study of the savings and loan industry (P.L. 89–426, 80 Stat. 143), scheduled for completion in December 1968, which may lead to legislation or regulations to eliminate the distribution problem involved in the present litigation.

[15] The Board subsequently approved at least two mergers of a federal mutual association into a stock association where the former had a negative net worth and there was nothing available for distribution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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MARCH 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968